In the Supreme Court of the United States.

OCTOBER TERM, 1909.

THE UNITED STATES, PLAINTIFF IN ERROR,
v.
PIERRE GRIMAUD AND J. P. CARAJOUS. } No. 490.

THE UNITED STATES, PLAINTIFF IN ERROR,
v.
ANTONIO INDA. } No. 491.

IN ERROR TO THE DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF CALIFORNIA.

BRIEF FOR THE UNITED STATES.

STATEMENT.

These two cases are alike in all respects. Defendants were indicted for grazing sheep upon the Sierra Forest Reserve without a permit, in violation of Regulation 45 established by the Secretary of Agriculture concerning stock grazing upon forest reserves, and reading as follows:

> Regulation 45. All persons must secure permits before grazing any stock in a forest reserve, except the few head in actual use by prospectors, campers, and travelers, and milch or

work animals, not exceeding a total of six head, owned by bona fide settlers residing in or near a forest reserve, which are excepted and require no permit. (Rec., 4.)

This regulation was made by the Secretary of Agriculture in the exercise of authority over forest reserves given him by the terms of the act of Congress approved June 4, 1897 (30 Stat., 11, 35), which reads as follows:

> No public forest reservation shall be established, except to improve and protect the forest within the reservation, or for the purpose of securing favorable conditions of water flows, and to furnish a continuous supply of timber for the use and necessities of citizens of the United States; but it is not the purpose or intent of these provisions, or of the act providing for such reservations, to authorize the inclusion therein of lands more valuable for the mineral therein, or for agricultural purposes, than for forest purposes.
>
> The Secretary of the Interior shall make provisions for the protection against destruction by fire and depredations upon the public forests and forest reservations which may have been set aside or which may be hereafter set aside under the said act of March third, eighteen hundred and ninety-one, and which may be continued; and he may make such rules and regulations and establish such service as will insure the objects of such reservations, namely, to regulate their occupancy and use and to preserve the forests thereon from destruction; and any violation of the provisions of this act

> or such rules and regulations shall be punished as is provided for in the act of June fourth, eighteen hundred and eighty-eight, amending section fifty-three hundred and eighty-eight of the Revised Statutes of the United States.

The following portions of the same act, which immediately succeed the paragraphs just quoted, ought also to be before the court:

> For the purpose of preserving the living and growing timber and promoting the younger growth on forest reservations, the Secretary of the Interior, under such rules and regulations as he shall prescribe, may cause to be designated and appraised so much of the dead, matured, or large growth of trees found upon such forest reservations as may be compatible with the utilization of the forests thereon, and may sell the same for not less than the appraised value in such quantities to each purchaser as he shall prescribe, to be used in the State or Territory in which such timber reservation may be situated, respectively, but not for export therefrom. Before such sale shall take place, notice thereof shall be given by the Commissioner of the General Land Office, for not less than sixty days, by publication in a newspaper of general circulation, published in the county in which the timber is situated, if any is therein published, and if not, then in a newspaper of general circulation published nearest to the reservation, and also in a newspaper of general circulation published at the capital of the State or Territory where such reservation exists; payments for such timber to be made to the

receiver of the local land office of the district wherein said timber may be sold, under such rules and regulations as the Secretary of the Interior may prescribe; and the moneys arising therefrom shall be accounted for by the receiver of such land office to the Commissioner of the General Land Office, in a separate account, and shall be covered into the Treasury. Such timber, before being sold, shall be marked and designated, and shall be cut and removed under the supervision of some person appointed for that purpose by the Secretary of the Interior, not interested in the purchase or removal of such timber nor in the employment of the purchaser thereof. Such supervisor shall make report in writing to the Commissioner of the General Land Office and to the receiver in the land office in which such reservation shall be located of his doings in the premises.

The Secretary of the Interior may permit, under regulations to be prescribed by him, the use of timber and stone found upon such reservations, free of charge, by bona fide settlers, miners, residents, and prospectors for minerals, for firewood, fencing, buildings, mining, prospecting, and other domestic purposes, as may be needed by such persons for such purposes; such timber to be used within the State or Territory, respectively, where such reservations may be located.

Nothing herein shall be construed as prohibiting the egress or ingress of actual settlers residing within the boundaries of such reservations, or from crossing the same to and from their property or homes; and such wagon roads

and other improvements may be constructed thereon as may be necessary to reach their homes and to utilize their property under such rules and regulations as may be prescribed by the Secretary of the Interior. Nor shall anything herein prohibit any person from entering upon such forest reservations for all proper and lawful purposes, including that of prospecting, locating, and developing the mineral resources thereof: *Provided*, That such persons comply with the rules and regulations covering such forest reservations.

That in cases in which a tract covered by an unperfected bona fide claim or by a patent is included within the limits of a public forest reservation, the settler or owner thereof may, if he desires to do so, relinquish the tract to the Government, and may select in lieu thereof a tract of vacant land open to settlement not exceeding in area the tract covered by his claim or patent; and no charge shall be made in such cases for making the entry of record or issuing the patent to cover the tract selected: *Provided further*, That in cases of unperfected claims the requirements of the laws respecting settlement, residence, improvements, and so forth, are complied with on the new claims, credit being allowed for the time spent on the relinquished claims.

The settlers residing within the exterior boundaries of such forest reservations, or in the vicinity thereof, may maintain schools and churches within such reservation, and for that purpose may occupy any part of the said forest reservation, not exceeding two

acres for each schoolhouse and one acre for a church.

The jurisdiction, both civil and criminal, over persons within such reservations shall not be affected or changed by reason of the existence of such reservations, except so far as the punishment of offenses against the United States therein is concerned; the intent and meaning of this provision being that the State wherein any such reservation is situated shall not, by reason of the establishment thereof, lose its jurisdiction, nor the inhabitants thereof their rights and privileges as citizens, or be absolved from their duties as citizens of the State.

All waters on such reservations may be used for domestic, mining, milling, or irrigation purposes, under the laws of the State wherein such forest reservations are situated, or under the laws of the United States and the rules and regulations established thereunder.

Upon the recommendation of the Secretary of the Interior, with the approval of the President, after sixty days' notice thereof, published in two papers of general circulation in the State or Territory wherein any forest reservation is situated, and near the said reservation, any public lands embraced within the limits of any forest reservation which, after due examination by personal inspection of a competent person appointed for that purpose by the Secretary of the Interior, shall be found better adapted for mining or for agricultural purposes than for forest usage, may be restored to the public domain. And any mineral lands

in any forest reservation which have been or which may be shown to be such, and subject to entry under the existing mining laws of the United States and the rules and regulations applying thereto, shall continue to be subject to such location and entry, notwithstanding any provisions herein contained.

The President is hereby authorized at any time to modify any executive order that has been or may hereafter be made establishing any forest reserve, and by such modification may reduce the area or change the boundary lines of such reserve, or may vacate altogether any order creating such reserve. (30 Stat., 35, 36.)

The act of Congress approved June 4, 1888, which amended Revised Statutes, section 5388, and which defines the nature and extent of the punishment adopted by the above-quoted act of June 4, 1897, for violation of that act or of a rule or regulation made by the proper executive department under that act, prescribes a punishment of not more than $500 fine or not more than twelve months' imprisonment, or both, for unlawfully cutting or wantonly destroying any timber upon lands of the United States reserved for military or other purposes or upon Indian lands. (25 Stat., 166.) The powers conferred upon the Secretary of the Interior by the act of June 4, 1897, in respect to making rules and regulations for the government of forest reservations were transferred to the Secretary of Agriculture by the act of February 1, 1905. (33 Stat., 628.)

The District Court sustained demurrers to the indictments. (Rec., 6 and 9, in case No. 490; Rec., 6 and 16, in case No. 491.)

The positions taken by the District Court were that the act of June 4, 1897, in authorizing the Secretary of Agriculture to make rules and regulations for the administration of forest reserves delegated legislative authority to an executive officer, and that such act of Congress is also unconstitutional because it empowers an executive officer to create a criminal offense. The opinion of the court is the same in both cases and is found on the pages of the two records just indicated.

The cases come to this court by direct writ of error to the District Court under the Criminal Appeals Act of March 2, 1907. (34 Stat., 1246.)

Beyond the questions raised and decided below, another arises concerning the applicability of the act of June 4, 1897, to forest reserves in California since June 6, 1900, in view of the last proviso of the following act of that date, amending the act of June 4, 1897:

> *Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,* That chapter two of the laws of the first session of the Fifty-fifth Congress, being an act entitled "An Act making appropriations for sundry civil expenses of the Government for the fiscal year ending June thirtieth, eighteen hundred and ninety-eight, and for other purposes," approved June fourth, eighteen hundred and ninety-seven, be,

and the same is hereby, amended by striking out the following words where the same appear in said Act, commencing with the word "Before," in line thirty-six on page thirty-five of volume thirty of the United States Statutes at Large, and ending with the word "exists," in the forty-third line of said volume and page, as follows: "Before such sale shall take place notice thereof shall be given by the Commissioner of the General Land Office, for not less than sixty days, by publication in a newspaper of general circulation published in the county in which the timber is situated, if any is therein published, and if not then in a newspaper of general circulation published nearest to the reservation, and also in a newspaper of general circulation published at the capital of the State or Territory where such reservation exists," and insert in lieu thereof the following: "Before such sale shall take place notice thereof shall be given by the Commissioner of the General Land Office, for not less than thirty days, by publication in one or more newspapers of general circulation, as he may deem necessary, in the State or Territory where such reservation exists: *Provided, however,* That in cases of unusual emergency the Secretary of the Interior may, in the exercise of his discretion, permit the purchase of timber and cordwood in advance of advertisement of sale at rates of value approved by him and subject to payment of the full amount of the highest bid resulting from the usual advertisement of sale: *Provided further,* That he may, in his discretion, sell without advertisement, in quan-

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tities to suit applicants, at a fair appraisement, timber and cordwood not exceeding in value one hundred dollars stumpage: *And provided further*, That in cases in which advertisement is had and no satisfactory bid is received, or in cases in which the bidder fails to complete the purchase, the timber may be sold, without further advertisement, at private sale, in the discretion of the Secretary of the Interior, at not less than the appraised valuation, in quantities to suit purchasers: *And provided further*, That the provisions of this Act shall not apply to existing forest reservations in the State of California, or to reservations that may be hereafter created within said State." (31 Stat., 661.)

ASSIGNMENT OF ERRORS.

The District Court erred in each case in sustaining the demurrer to the indictment.

ARGUMENT.

The following propositions will be advanced:

I. The act of June 6, 1900, amending the act of June 4, 1897, merely excepted forest reservations in California from the general statutory provisions concerning sale of "the dead, matured, or large growth of trees" upon forest reservations. It left all other provisions of the general plan embraced in the act of June 4, 1897, for the administration of forest reservations, still applicable to forest reservations in California as well as elsewhere.

II. The departmental regulation, forbidding stock grazing on a forest reservation without a permit from

the department, is a valid exercise of administrative power, because Congress itself has fixed the general rule to which the department regulations must conform—or, in other words, Congress itself has defined the fundamental ends, viz, protection and improvement of the forests on the reservation, to which the regulations must be subordinate means—and the particular regulation as to stock grazing, which is here involved, conforms to the congressional rule and fairly promotes the designated congressional ends.

III. In refusing permits to use a forest reservation for stock grazing except upon stated terms or in stated ways, the Secretary of Agriculture merely asserts and enforces the proprietary right of the United States over land which it owns. The regulation of the Secretary, therefore, is not an exercise of legislative, or even of administrative, power; but is an ordinary and legitimate refusal of the landowner's authorized agent to allow persons having no right in the land to use it as they will. The right of proprietary control is altogether different from governmental authority.

IV. The regulation of the Secretary of Agriculture being a valid restriction upon use of the forest reservation, which all persons may lawfully be required by Congress to obey, it was permissible for Congress to sanction its requirement of general obedience to that regulation by expressly making disobedience punishable criminally. The crime of violating the regulation is not created by the Secretary of Agriculture, but by Congress itself.

Of these, *seriatim*—

I.

The act of June 6, 1900, amending the act of June 4, 1897, merely excepted forest reservations in California from the general statutory provisions concerning sale of "the dead, matured, or large growth of trees" upon forest reservations. It left all other provisions of the general plan embraced in the act of June 4, 1897, for the administration of forest reservations, still applicable to forest reservations in California as well as elsewhere.

The specific inquiry arises under the last proviso of the act of 1900, which reads:

> *And provided further*, That the provisions of this Act shall not apply to existing forest reservations in the State of California, or to reservations that may be hereafter created within said State.

Does this proviso repeal the entire act of 1897 as to forest reservations in California, or does it merely except the California reservations from the operation of the general statutory rules concerning the sale of dead or matured timber? In the way of verbal form this inquiry may have three branches:

1. Do the words "*this* act" in the proviso of 1900 refer to the act of 1900 itself or to the act of 1897?

2. Do the words "*the provisions* of this act" relate—even if "this act" means the act of 1897—to more than the sale clauses which are the subject both of the act of 1900 and of the paragraph of the act of 1897 which the act of 1900 amends? May not "the

provisions" which the act of 1900 makes inapplicable to California reservations be interpreted to be merely such provisions as relate to the sale of dead or matured timber?

3. Do not the words "*And provided further,*" which mark as a proviso the sentence against application to California reservations, indicate that the proviso is an incident to, and restricted in its scope by, the regulations concerning sale of dead and matured timber, which alone were the subject of the enactment of 1900 and of the paragraph of the act of 1897 which the act of 1900 amended?

Undoubtedly the verbal possibilities of the proviso which it is necessary to interpret admit contradictory answers; but that means only that there is an ambiguity to be resolved. Its resolution must obey the spirit of the legislation; and an answer in accordance with such spirit is proper and indeed imperative, though it narrows the generality of the statutory language.

> *Holy Trinity Church* v. *United States* (143 U. S., 457).

In that case a general prohibition against the incoming of foreigners under contract for "labor of any kind" was restricted to immigration for manual labor.

On all three of the particular questions above indicated several general and deeply practical considerations should be decisive; and they will be presented at the outset because they are more important than any mere verbal detail.

(*a*) If the act of 1897 should be held altogether inapplicable to California forest reservations, by reason of the proviso of 1900, the result would be to create a legislative void concerning the control, preservation, and utilization of forest reservations in that State. The act of 1897 contains a general scheme for control and administration of the forest reservations, and that scheme was applied to such reservations everywhere. Nothing was put in its place by the act of 1900, or ever since has been put in its place. It is not to be supposed, if any other view is possible, that Congress intended in 1900 to leave the California reservations uncovered by a regulative and protective system.

Concretely, the act of 1897 requires survey of forest reservations; allows the President to revoke, modify, or suspend any former proclamation establishing a forest reservation; authorizes executive promulgation of rules for protection of the forests (which is the central element of the present case); gives to the public certain qualified rights of taking timber or stone from the reservation for domestic or business purposes; authorizes roads for ingress and egress of settlers; permits relinquishment of the tracts already settled within the forest reservation, and entry of lieu lands elsewhere; and allows entry of mineral lands within the forest reservation. Are all these salutary and important provisions to be considered obliterated in California forest reservations by the act of 1900 without anything having been put in their place?

Statutes must be so construed as to avoid absurd or unreasonable results if in any way it be possible.

United States v. *Kirby* (7 Wall., 482).

(*b*) Indubitably the general plan of forest administration embraced in the act of 1897 has been continuously in force since that date, and still is in force, everywhere but in California. What good or even specious reason can be advanced for any intention on the part of Congress to except California reservations alone from that general system?

(*c*) Such an act as that of 1900, dealing otherwise with the single and unimportant subject of the manner of selling dead and matured timber upon forest reservations, is a most unnatural vehicle for a repeal of the preceding statute of 1897, in all its many parts and ramifications, so far as it bore upon that part of the United States, California, which perhaps contains the most important forest tracts of the country. Beyond that, the middle of a section of the act of 1897, dealing merely with the sale of dead and matured timber and itself located in the middle of the entire act of 1897, is a most unnatural and unworthy place for a clause extinguishing the entire act as to a large part of the forest-bearing domain of the country. As was said by this court, in another connection:

> We should hardly look for such legislation in an act having the declared purpose and scope of the one now under consideration. (*White* v. *United States*, 191 U. S., 545, 552.)

Indeed, such an obscure and almost insidious undoing of the general legislation concerning forest reservations can not at all be ascribed to Congress.

The history of the amendment of 1900 is in full as follows:

On January 12, 1900, Mr. Gamble, of South Dakota, introduced the following bill:

> *Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled*, That chapter two of the laws of the first session of the Fifty-fifth Congress, being an Act entitled: "An Act making appropriations for sundry civil expenses of the Government for the fiscal year ending June thirtieth, eighteen hundred and ninety-eight, and for other purposes," approved June fourth, eighteen hundred and ninety-seven, be, and the same is hereby, amended by striking out the following words where the same appear in said Act, commencing with the word "Before" in line thirty-six, on page thirty-five of volume thirty of the United States Statutes-at-Large, and ending with the word "exists" in the forty-third line of said volume and page, as follows: "Before such sale shall take place notice thereof shall be given by the Commissioner of the General Land Office, for not less than sixty days, by publication in a newspaper of general circulation published in the county in which the timber is situated, if any is therein published, and if not, then in a newspaper of general circulation published nearest to the reservation, and also in a news-

> paper of general circulation published at the capital of the State or Territory where such reservation exists," and inserting in lieu thereof the following: "Before such sale shall take place notice thereof shall be given by the Commissioner of the General Land Office, for not less than thirty days, by publication in one or more newspapers of general circulation, as he may deem necessary, in the State or Territory where such reservation exists: *Provided*, That the Commissioner of the General Land Office shall have authority to sell, in case of emergency, such timber from the forest reserve as shall have been designated to any individual or corporation upon giving notice and under such rules and regulations as the Secretary of the Interior shall prescribe." (H. R. 6063, 56th Cong., 1st sess.)

It appears, therefore, that the bill at the outset had no other purpose than to alter the rules concerning manner of sale of dead and matured timber. The House Committee, to which the bill was referred, recommended its passage, with the following amendment:

> Strike out all after the word "exists" in the seventeenth line on page two, and insert in lieu thereof the following: *Provided, however*, That in cases of unusual emergency the Secretary of the Interior may, in the exercise of his discretion, permit the purchase of timber and cord wood in advance of advertisement of sale, at rates of value approved by him and subject to payment of the full amount of the

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highest bid resulting from the usual advertisement of sale: *Provided further,* That he may, in his discretion, sell without advertisement, in quantities to suit applicants, at a fair appraisement, timber and cord wood not exceeding in value one hundred dollars stumpage: *And provided further,* That in cases in which advertisement is had and no satisfactory bid is received, or in cases in which the bidder fails to complete the purchase, the timber may be sold, without further advertisement, at private sale, in the discretion of the Secretary of the Interior, at not less than the appraised valuation, in quantities to suit purchasers. (House Report 178, vol. 1; 56th Cong., 1st sess.)

The amendment, like the original bill, dealt only with the manner of selling dead and matured timber. There was nothing in the bill or the amendment for exclusion of California from the general forest-reserve law. On February 2, 1900, Mr. Gamble asked for a consideration of the bill. (33 Cong. Rec., 1445.) In a short debate that followed, Mr. Loud, of California, asked Mr. Gamble if the bill did not propose to remove the restriction of advertising as provided under existing law, to which Mr. Gamble replied that it merely reduced the time of advertising to thirty days and permitted the Secretary of the Interior, in cases of urgency, to sell without advertisement timber of value not exceeding $100 for cord wood and for use of miners. Mr. Loud objected to the further consideration of the bill. (33 Cong. Rec., 1445–1446.)

On March 5, 1900, Mr. Lacey called up the bill. (33 Cong. Rec., 2558.) The bill was read again with the amendment recommended by the committee, and a little further debate followed, in which Mr. Loud renewed his objection to the bill, but without assigning any reason therefor. (Ib., 2558.)

On May 14, 1900, Mr. Gamble asked unanimous consent for the consideration of the bill and its amendment. Mr. Loud asked Mr. Gamble if he intended to offer the amendment which had been suggested. (It appears only by inference that the amendment referred to by Mr. Loud was one excluding California from the bill.) Mr. Gamble replied:

> Yes, undoubtedly. I will state to the Speaker that the gentleman from California, who has heretofore objected, waives that objection, if an amendment which I will submit is considered, and which is satisfactory to the California delegation. (33 Cong. Rec., 5522.)

Mr. Lacey then asked if the amendment was a general one applying to all public lands, and Mr. Gamble replied:

> It excepts California from the operation of *this* provision of law.

Mr. Payne then said:

> I would like to know why, if this amendment to this bill as a whole is good for California, it is not good for the whole United States.

To this Mr. Loud replied:

> I will state, in response to the gentleman from New York, that the harm was done originally in the sundry civil bill, which was passed more than a year ago, and to which the pending bill refers. Conditions in the State of California are entirely different, as far as the forest reserves are concerned, from those of Washington, Oregon, and South Dakota. There is and has been a mistake, I think, in the legislation of Congress in this regard. It is impossible to adopt general legislation that will cover a territory so widely different in its interests as our western territory. *As a matter of fact, we have but little timber in California. We want legislation to protect what is remaining. This is essential for the purpose of retaining water derived from the rainy season for the purpose of fertilizing our lands.*
>
> *In Oregon and Washington and that region generally they have more timber than they know what to do with. I do not think that the people of Washington and Oregon, therefore, are able to understand exactly the necessity and the conditions which prevail with us.* (33 Cong. Rec., 5522.)

Subsequently Mr. Loud said, in response to the questions of other gentlemen as to the attitude of other States:

> I do not think there will be any objection in Oregon and Washington, where they have to burn timber to get rid of it.

The amendment excluding California was agreed to, as well as the other amendments, and the bill was passed. (33 Cong. Rec., 5522, 5523.)

It is thus apparent that Mr. Loud's objection was to any sale of timber on the forest reserves in California, and his purpose in insisting on the amendment excluding California from the operation of the act was to prevent any further sales there. There is no intimation anywhere that he or anybody else desired to take California out of the operation of any other provisions of the act of June 4, 1897. On the contrary, the provisions of that act and the scheme of administration of the forest reserves established by that act are of a character to accomplish just the purpose which Mr. Loud declared.

The bill as passed by the House was passed by the Senate on June 4, 1900 (33 Cong. Rec., 6532), and was approved by the President on June 6, 1900.

From this history it is plain that the final proviso of the amendment of 1900 was intended, not as a proviso to the act of 1897, with the result of excluding California forest reserves from that act, but as a proviso to the amending act of 1900 itself, with the result merely of excluding California forest reservations from the general rules concerning sale of dead and matured timber.

(*d*) Practical executive construction opposes the idea that the act of 1900 extinguished all of the act of 1897 as respects forest reservations in California. Since 1900, no less than before, the Department of Agriculture and the Bureau of Forestry have con-

tinuously and uniformly treated the act of 1897 as still applying to the California forest reservations, with the single modification concerning sales of dead and matured timber made by the act of 1897.

In the Forest Reserve Manual, approved by the Secretary of the Interior April 12, 1902, on page 14, under the heading "Sale of timber in forest reserves," paragraph 6, referring to applications for the purchase of timber, reads:

> If approved, the timber will be advertised in a local paper for thirty days (sixty days in California).

Paragraph 8 reads:

> At the end of thirty days (sixty days in California) the timber will be awarded to the highest bidder, etc.

These regulations were based upon the departmental view that the sixty-day rule prescribed by the act of 1897 was still in force in California.

After the passage of the amending act of 1900 the General Land Office continued to administer the forests in California under the act of June 4, 1897, just as it had before. The reports of the Commissioner of the General Land Office for 1901 (p. 129), for 1902 (p. 384), for 1903 (pp. 286, 289, 290), for 1904 (pp. 302, 303, 306, 307), all show that grazing was being constantly controlled by the permit system in California as elsewhere, and also that timber sales were being made and free use of timber granted under the permit system on the forest reserves in California.

The reports of the Forester of the Agricultural Department for 1906 (pp. 16 and 19), and for 1907 (pp. 27 and 31) also show that the act of 1897 and the regulations made thereunder were being enforced in the national forests in California as elsewhere.

In other words, the practical construction by the department having administration of the forest-reserve laws was that the amending act related only to the method of advertising timber sales and that California was excepted from the operation of the amendment.

Congress itself has never questioned or interfered with this practical application of the act of 1897 at all times by the appropriate executive departments to the California forest reservations; and such failure to object or interfere shows congressional acquiescence in the continued applicability of the act of 1897 to California.

(*e*) Congress, indeed, inserted this clause in the act of June 30, 1906 (34 Stat., 669, 684)—

> and hereafter sales of timber on forest reserves in the State of California shall in every respect conform to the law governing such sales in other States, as set forth in the act of June sixth, nineteen hundred.

Here is an express description of the act of 1900 as a "law governing (such) sales" of timber on forest reservations; and in that light evidently the act has always been viewed by Congress. Further, does not this act of 1906 manifest that Congress then supposed the forest reservations in California to be under like

general rules with such reservations elsewhere, except in the single matter of sales of timber? Was not the act of 1906, just quoted, intended to undo all that was supposed by Congress to have been done in the act of 1900?

(*f*) The Commissioners to Revise and Codify the Laws of the United States, in their final report of December 19, 1906, to Congress betrayed no thought that forest reservations in California had been taken out of the operation of the act of 1897. They deal with the subject of "national forests" in Title XXII, chapter 13, and therein repeat the provisions of the act of 1897 in reference to all forest reservations, without any exception of California. (Revision of the Laws of the United States, pp. 74–76.) The stated revision, as is well known, is being made under the direction of a joint committee of the two Houses of Congress, and their treatment of the matter in hand has persuasive force.

(*g*) Private titles to land will be invalidated extensively and disastrously if it can now be held that since 1900 the act of 1897 has had no application to forest reservations in California. For example, the act of 1897 says that—

> any mineral lands in any forest reservation which have been or which may be shown to be such, and subject to entry under the existing mining laws of the United States and the rules and regulations applying thereto, shall continue to be subject to such location and entry, notwithstanding any provisions herein contained. (30 Stat., 36.)

Many and valuable mineral entries have been made in California since 1900 under this law; and they are void if the law no longer embraces California.

Again, this act of 1897 provides that—

> in cases in which a tract covered by an unperfected bona fide claim or by a patent is included within the limits of a public forest reservation, the settler or owner thereof may, if he desires to do so, relinquish the tract to the Government, and may select in lieu thereof a tract of vacant land open to settlement not exceeding in area the tract covered by his claim or patent; and no charge shall be made in such cases for making the entry of record or issuing the patent to cover the tract selected: *Provided further*, That in cases of unperfected claims the requirements of the laws respecting settlement, residence, improvements, and so forth, are complied with on the new claims, credit being allowed for the time spent on the relinquished claims. (30 Stat., 36.)

Many such relinquishments of lands within California forest reservations have been made, and many entries of lieu lands have been founded on such relinquishments, since 1900. They are all invalid if the act of 1897 was repealed as to California by the act of 1900.

If, then, the operation of the act of 1900 can possibly be restricted to the single subject of sales of dead and matured timber, it surely must be. This brings us to a consideration of the three verbal inquiries stated at the beginning.

1. The words "this act" in the last proviso of the act of 1900 relate to that act itself, and not to the act of 1897. If the quotation marks bounding what purports to be inserted by the amendment in the act of 1897 were found at the beginning instead of the end of the last proviso in the act of 1900, the matter would be clear. Only the part preceding such last proviso would then be properly transferable to the act of 1897; and the last proviso itself would be an obvious statement that the amending provisions of the act of 1900 should not be applied to the act of 1897 in the case of California reservations. It needs no citation of authorities, however, to support the rule that marks of punctuation in a statute have no controlling force. They may be eliminated or altered; and *a fortiori* their place may be changed. Quotation marks, instead of having more sanctity than other punctuation, have rather less, for they do not enter at all into the sentence construction. If only the large considerations of policy and propriety which have already been adduced were available to show error in the placing of the quotation marks at the end of the last proviso in the act of 1900 instead of at its beginning, those considerations would suffice; but the growth of this act of 1900 in Congress affords simple and immediate reason for correction of the punctuation.

The history of the bill's progress to its final form has already been given. It appears that the last proviso was not a structural part of the original bill

or of any other amendments to the bill, but came in as a separate thing on final passage of the bill. It might well, therefore, be a restriction of the operation of the amending act itself, instead of being a part of the language to be inserted in the act of 1897 in lieu of the other sentences of that act which were stricken out by the act of 1900. The quotation marks, in other words, might well and properly go before, rather than after, the final proviso.

Additionally, the placing of the quotation marks must have been the act of a clerical employee of the House, instead of appearing in the bill as originally introduced or in the bill as proposed by the Committee on Public Lands. This makes acute the absurdity of attaching any stress to the presence or place of the quotation marks.

In the Senate the bill passed without alteration from its final House form. (Cong. Rec., 56th Cong., 1st sess., vol. 33, pt. 7, pp. 6531, 6532.)

2. In any event, "the provisions" which the act of 1900 makes inapplicable to California forest reservations are only the sale clauses, which are the subject both of the act of 1900 and of that paragraph of the act of 1897 into which the act of 1900 introduced some changes. Though these words—"the provisions of this act"—*may* mean all provisions of the act, it does no violence to the language to interpret it as meaning only such provisions as formed the subject of the amending act and of the paragraph of the original act which was amended, viz, the

provisions concerning sale of dead or matured timber.

Holy Trinity Church v. *United States* (143 U. S., 457).

Law Ow Bew v. *United States* (144 U. S., 47, 59).

General language is often narrowed by interpretation.

3. The very nature of the last sentence of the act of 1900 as a *proviso* both justifies and requires limitation of its language to the provisions concerning sales of timber, to which the proviso was appended. The true office of a proviso is to make an exception from, or to put a qualification upon, the language to which the proviso is added. The proviso under consideration was annexed to a bill dealing only with sales of timber. It is true that (unless the quotation marks were wrongly placed, as above submitted) it was required to be carried into the body of the act of 1897; but it went there by force of the act of 1900 and with the signification which it should receive as a part of such act of 1900, appended to mere regulations of timber sales.

The three provisos in the act of 1900 which precede the final proviso relate only to timber sales. The final proviso should be considered to have the same subject in mind, and no more.

From the legislative debates, as well as the successive changes in the act of 1900, it has already been shown that never was any topic whatever but the regulation of timber sales in the mind of anybody

during the progress of the enactment. (Cong. Rec., *passim, supra.*) The report of the House Committee on Public Lands shows the same. (House Report No. 178; 56th Cong., 1st sess.) Such report may properly be considered as a guide to interpretation of the statute.

Oceanic Navigation Co. v. *Stranahan* (214 U. S., 320, 333.)

II.

The departmental regulation, forbidding stock grazing on a forest reservation without a permit from the department, is a valid exercise of administrative power; because Congress itself has fixed the general rule to which the department regulations must conform—or, in other words, Congress itself has defined the fundamental ends, viz, protection and improvement of the forests on the reservation, to which the regulations must be subordinate means—and the particular regulation as to stock grazing, which is here involved, conforms to the congressional rule and fairly promotes the designated congressional ends.

1. The act of June 4, 1897, expressly declares at the outset that the objects of a forest reservation are "to *improve and protect* the forest within the reservation, or for the purpose of securing favorable conditions of water flows, and to furnish a continuous supply of timber for the use and necessities of citizens of the United States." (30 Stat., 35.) These purposes reduce fundamentally to the protection and improvement of the forests; for the supply of timber to the public and the maintenance of favorable conditions of water flow are secondary results.

The rules and regulations prescribed by the executive department concerning the conduct of a forest reservation can not, therefore, be arbitrarily adopted in disregard of the fundamental rule established by Congress itself for their general nature and operation. They must meet the congressional standards by being relevant to the declared congressional purposes, or be void. They must be fairly promotive of such purposes. The rules and regulations are required by Congress to be subordinate to, and to operate only as supplemental details of, the general principles which Congress has itself announced. The adoption of such subordinate and supplemental rules is not legislation, but proper administration. The regulations do no more than make specific application of the controlling principles fixed by Congress. They express particulars which the general declaration of the legislature comprehends. The cases which might be cited from the decisions of this court on the point in hand are very many; but the following are leading and will suffice:

In re Kollock (165 U. S., 526, 533, 536).
Buttfield v. *Stranahan* (192 U. S., 470, 492).
Union Bridge Co. v. *United States* (204 U. S., 364).

The oleomargarine act, considered in the *Kollock* case, required packages of oleomargarine to be "marked and branded as the Commissioner of Internal Revenue, with the approval of the Secretary of the Treasury, shall prescribe" (p. 528). The Commissioner of Internal Revenue promulgated rules defining particularly the nature and manner of the

marking; there being no description of those matters in the statute itself. The Chief Justice said that the action of the Commissioner was "merely in the discharge of an administrative function and falls within the numerous instances of regulations needful to the operation of the machinery of particular laws, authority to make which has always been recognized as within the competency of the legislative power to confer" (p. 536).

And it may at once be noticed that a sale of oleomargarine in packages not marked in compliance with the rules of the Commissioner of Internal Revenue was punished as a crime in this *Kollock* case.

In *Buttfield* v. *Stranahan*, *supra*, the statute in its first section made it unlawful "to import or bring into the United States any merchandise as tea which is inferior in purity, quality, and fitness for consumption to the standards provided in section 3 of this act, and the importation of all such merchandise is hereby prohibited." Section 3 of the same act provided that the Secretary of the Treasury, upon the recommendation of a board of tea experts, should "fix and establish uniform standards of purity, quality, and fitness for consumption of all kinds of teas imported into the United States" (p. 494). The establishment of such standards for tea was held a proper administrative act; and destruction of the teas involved in the case was upheld, for noncompliance with the Treasury standards.

In *Union Bridge Co.* v. *United States*, *supra*, the statute declared that the Secretary of War might require alteration of any bridge at its owner's ex-

pense if the bridge were "an unreasonable obstruction to navigation." The power conferred upon the Secretary of War to determine the "unreasonableness" of the obstruction by the bridge was held not legislative, but administrative; and none the less so, though refusal to obey the Secretary of War's decision was made by the statute a criminal offense.

2. The regulation about stock grazing, which is here involved, is fairly and importantly pertinent to the declared congressional objects of protecting and improving the forests.

(*a*) The system of permits affords a method of supervision of applications for grazing privileges and determination of the responsibility of applicants.

(*b*) Knowledge of all persons using the reservation, through the issued permits, and a resultant opportunity to identify offenders against protective rules about fires, timber cutting, etc., is of obvious importance.

(*c*) The number of cattle or sheep allowed to graze upon the reservation at one time has to be controlled.

(*d*) Grazing often should be restricted to proper seasons of the year, so as to save young growth of shrubbery and trees, and indeed to protect the health of the soil.

More than mere suggestion of *some* ways in which this regulation may conserve the forest is unnecessary, as the appropriateness of the Secretary's regulation should be presumed in the absence of contrary showing. The regulation certainly will not be held irrelevant to the congressional rule, that the forest be preserved and improved, upon demurrer and without

evidence, unless the impropriety of the regulation is demonstrable on a ground which evidence can not meet.

III.

In refusing permits to use a forest reservation for stock grazing except upon stated terms or in stated ways, the Secretary of Agriculture merely asserts and enforces the proprietary right of the United States over land which it owns. The regulation of the Secretary, therefore, is not an exercise of legislative, or even of administrative, power; but is an ordinary and legitimate refusal of the landowner's authorized agent to allow persons having no right in the land to use it as they will. The right of proprietary control is altogether different from governmental authority.

1. Congress has not itself given to the public the right of grazing sheep on forest reservations. The act of 1897 does give certain privileges of use, e. g., the use of timber and stone "by bona fide settlers, miners, residents, and prospectors for minerals, for firewood, fencing, buildings, mining, prospecting, and other domestic purposes." It also says that nothing in the act shall "prohibit any person from entering upon such forest reservations for all proper and lawful purposes, including that of prospecting, locating, and developing the mineral resources thereof: *Provided*, That such persons comply with the rules and regulations covering such forest reservations." (30 Stat., 36.) But—

(*a*) "Entering * * * for all proper and lawful purposes" does not include consumption of the undergrowth and grass by stock.

(*b*) The "proper and lawful purposes" are those sanctioned by other express statutes.

(*c*) In any event, all use of the reservation under this clause is expressly conditioned upon obedience to "the rules and regulations covering such forest reservations." If anybody uses the land in contravention of such regulations, the statute in that case gives him no leave, and he is a trespasser as much as if there were no statute giving him the privilege of use in any case or way.

2. It results that the statute, in empowering the Secretary to regulate the occupancy and use of the forest reserve, gives to him as agent of the United States, which owns the land, the right to forbid, or to impose conditions upon, the use of the reserve in any way not specifically authorized by Congress itself, as in taking timber or stone for particular purposes, or in entering and developing mineral portions. The Secretary, in prohibiting stock grazing upon the reservation without a permit, does only the same thing as any landowner's agent when he refuses, in behalf of the owner and in the exercise of the owner's right, to let people generally use the land.

3. How is this regulation of the Secretary an exercise of any governmental power? The United States, as owner of the land, can refuse to others the privilege of using it. Congress, as general administrator of the property of the United States, can withhold the use of such property; and can insist, with or without reason, upon the property's lying wholly idle. It therefore can say that nobody may use the land without the

consent of the Secretary of Agriculture—or, for that matter, of anybody else—as agent appointed by Congress for the United States as owner.

The power granted to the Secretary of Agriculture, at least in respect of the regulation here involved, is merely to assert or to waive the landowner's exclusive right over his property.

Suppose that Congress should empower the Secretary of the Interior to lease portions of the public domain if he should deem it advisable and should procure terms considered by him satisfactory. Would that be a delegation of legislative power, or even a grant of administrative authority—or, rather, an appointment of a managing agent for exercise of part of the proprietary rights of the United States? This act of June 4, 1897, which empowers the Secretary of Agriculture to prescribe the terms or conditions upon which the public may use part of the public domain, is not different.

IV.

The regulation of the Secretary of Agriculture being a valid restriction upon use of the forest reservation, which all persons may lawfully be required by Congress to obey, it was permissible for Congress to sanction its requirement of general obedience to that regulation by expressly making disobedience punishable criminally. The crime of violating the regulation is not created by the Secretary of Agriculture, but by Congress itself.

This point should be given two independent treatments: First, in view of the regulation as a valid administrative order; and, second, in view of the

regulation as a refusal by the landowner's agent to consent to use of the land by others than the owner, except on stated conditions.

1. Considering the regulation as an administrative order—

The question of criminal sanction is really settled by—

In re Kollock (165 U. S., 526).

Union Bridge Co. v. *United States* (204 U. S., 364).

Caha v. *United States* (152 U. S., 211).

United States v. *Bailey* (9 Peters, 238).

In each of the first two of these cases a criminal conviction was sustained for violation of an administrative order. The *Caha* and *Bailey* cases also seem to involve the very point, for in the *Caha* case a conviction of perjury was upheld when the false oath was taken in a proceeding authorized only by administrative regulation, and in the *Bailey* case a conviction of perjury was sustained when the false oath was taken before an officer whom a Treasury regulation alone authorized to administer the oath.

Nothing to the contrary of the foregoing cases or of the contention here made was involved in *United States* v. *Eaton* (144 U. S., 677). In that case an indictment against a wholesale dealer in oleomargarine for failing to keep such books and make such returns as were required of him by a regulation of the Commissioner of Internal Revenue was held bad because nothing in the statute made a violation of the regulation of the Commissioner criminal unless it was, within

section 18 of the statute, a neglect or refusal "to do or cause to be done any of the things *required by law*" in the conduct of the indicted party's business. The decision was that the language "required by law" must be taken to refer to things required by the statute itself, and not to things required only by regulation of the Commissioner, there being nothing in the statute then considered which expressly made a violation of regulation criminal, as does the statute involved in the present case. The *Eaton* case, in other words, involved merely a construction of the scope of the words "required by law" in the statute then under view, and presented no question whether the statute would have been valid if it had unmistakably made it a crime to transgress the commissioner's regulation. Beyond that, the oleomargarine act, considered in the *Eaton* case, in terms (section 5) required every manufacturer of oleomargarine to keep books and make returns as the Commissioner's regulation required of wholesale dealers, but itself made no such requirement of wholesale dealers. The power of the Commissioner under section 20 of the act to "make all needful regulations for the carrying into effect of this act" (p. 685) perhaps did not reach to such a regulation as he had made.

The very question now presented to the court, whether a criminal indictment lies for transgression of the department regulation concerning stock grazing upon a forest reservation, was answered in the affirmative in 1898 by Solicitor-General Richards. (22 Opin. Atty. Gen., 266.)

Among the decisions of the lower Federal courts pertinent to the matter in hand, the following upheld the Secretary's regulation as valid for civil purposes:

Dastervignes v. *United States* (122 Fed., 30).
United States v. *Dastervignes* (118 Fed., 199).
United States v. *Shannon* (151 Fed., 863).

The following have held indictment for violation of the regulation supportable:

United States v. *Deguirro* (152 Fed., 568).
United States v. *Domingo* (152 Fed., 566).
United States v. *Bale* (156 Fed., 687).

On the other hand, the following held such an indictment bad:

United States v. *Blasingame* (116 Fed., 654).
United States v. *Matthews* (146 Fed., 306).

2. Treating the regulation as a refusal by the owner's agent to consent to the use of the land by others, unless they procure a permit—

The congressional enactment, that use of the land in violation of regulation should be a crime, then comes to merely this: That use of the land after refusal of the owner's consent shall be a criminal trespass. The absence of assent by the owner to the entry or use is but one element of fact among the several which Congress has declared shall together constitute a criminal offense. The rule of criminal liability is fixed by Congress; and its essential factors are defined by the legislature.

It is, of course, within the congressional power to make trespass on United States lands a crime. Willful trespass upon private lands has often been made

criminal by state legislatures. In every such case the absence of consent of the landowner to the entry is but a fact whose existence characterizes the entry as unlawful. The act of Congress, in the view now presented, means the same as if it read: "It shall be a crime to enter upon or use forest lands of the United States after refusal of the consent of the Secretary of Agriculture." What is that but an exact analogue of the law of larceny, which is that it shall be a crime to take another's personal property *without his consent* in a purpose of appropriating it? Or of embezzlement? Or of rape, which is the crime of unlawful sexual use of a woman's person *without her consent?*

The judgments sustaining the demurrers to the indictments should be reversed.

LLOYD W. BOWERS,
Solicitor-General.

FEBRUARY, 1910.

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